

JAN 31 2007

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FEDERAL ELECTION COMMISSION

999 E Street, N.W.

Washington, D.C. 20463

2007 JAN 31 AM 11:30

SENSITIVE

FIRST GENERAL COUNSEL'S REPORT

MUR: 5722

DATE COMPLAINT FILED: MARCH 27, 2006

DATE OF NOTIFICATION: APRIL 3, 2006

DATE ACTIVATED: SEPTEMBER 12, 2006

EXPIRATION OF SOL: DECEMBER 7, 2010

COMPLAINANT: Lisa Pierce

RESPONDENTS: Friends for Lauzen and Lee Holmes, in his official
capacity as Treasurer
Chris Lauzen

RELEVANT STATUTES
AND REGULATIONS:

2 U.S.C. § 433

2 U.S.C. § 434

2 U.S.C. § 441b

2 U.S.C. § 441a(a)(1)(a)

11 C.F.R. § 100.72(a)

11 C.F.R. § 100.131(a)

INTERNAL REPORTS CHECKED: FEC Disclosure Reports

FEDERAL AGENCIES CHECKED: None

I. INTRODUCTION

The complaint in this matter alleges that Illinois State Senator Chris Lauzen may have violated the Federal Election Campaign Act of 1971, as amended ("the Act"), by using funds from Friends for Lauzen, a State political committee formed for the purpose of re-electing Mr. Lauzen to the Illinois State Senate (hereinafter "the State committee"), to pay for an exploratory telephone poll for a possible run for Congress.¹ In response to

¹ In his campaign for re-election to the Illinois State Senate from the 25th District, Mr. Lauzen won both the primary election held on March 21, 2006, and the general election held on November 7, 2006

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1 the complaint, the State committee argues that the poll at issue was not “testing the
2 waters” activity, and, therefore, was not subject to the requirement that only funds that
3 are permissible under the Act be used for “testing the waters” activities.² The State
4 committee further argues that even if Mr. Lauzen had engaged in “testing the waters”
5 activity, it had received permissible funds sufficient to cover the cost of the poll.

6 The complainant also alleges that she received an email “that would normally be
7 sent from Senator Lauzen” from a sender designated “Lauzen for Congress,” and
8 questions whether “Lauzen for Congress” should have registered and reported as a
9 political committee. In response, the State committee asserts that any reference to Mr.
10 Lauzen’s alleged congressional committee was an inadvertent error made by a vendor
11 and was corrected with a subsequent email within 90 minutes of the original email.

12 Based upon the complaint and the response, we recommend that the Commission
13 dismiss, as a matter of prosecutorial discretion, the allegation as to all three Respondents
14 that they violated 11 C.F.R. § 100.131(a) or 11 C.F.R. § 100.72 by financing a poll for
15 testing the waters using funds from Mr. Lauzen’s State campaign committee, and
16 admonish the Respondents. We further recommend that the Commission find no reason
17 to believe that Mr. Lauzen violated 2 U.S.C. §§ 433 and 434 by failing to have “Lauzen
18 for Congress” registered as a political committee and disclosure reports filed with the
19 Commission.³

² Chris Lauzen did not submit a response to the complaint

³ In a supplemental response to the complaint, the State committee argues that the complainant did not reside at the address listed in the complaint and, therefore, the complainant failed to adhere to 11 C.F.R. § 111.4, which requires a complainant to provide his or her address. The State committee argues that, for this reason, the Commission should take no action on this matter pursuant to 11 C.F.R. § 111.5(b). However, a search of public records revealed that the complainant, in fact, resided at the address noted in the complaint.

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1 **II. FACTUAL AND LEGAL ANALYSIS**

2 **A. Factual Summary**

3 The complaint cites a news article about a telephone poll conducted in or around
4 November 2005 that "seemed to promote" Mr. Lauzen for Congress. According to the
5 complaint, a number of individuals confirmed that they had been called to participate in
6 such a telephone poll. The complaint questions who paid for the poll, and, referring to
7 Mr. Lauzen's State committee's disclosure reports, specifically questions the nature of a
8 \$12,750 expenditure for "campaign consulting" made by Friends for Lauzen on
9 December 7, 2005 to Sherman Consulting, a firm that provides polling services, among
10 other services.

11 In response to the complaint, the State committee acknowledges that from
12 November 8-10, 2005, it conducted a poll of Republican voters in the Illinois 14th
13 Congressional District. The State committee further acknowledges that one purpose of
14 the poll was "to gauge voter preferences in a hypothetical congressional election that may
15 or may not occur at some point in the distant future." According to the State committee,
16 among other topics covered in the poll, voters were asked their candidate preference if
17 Representative Dennis Hastert retired from Congress and the 14th District were an "open
18 seat" for the 2008 election cycle.⁴

19 The State committee does not dispute that funds from Mr. Lauzen's State
20 campaign account were used to conduct the poll. Rather, it argues that the poll at issue

⁴ The State committee states that other purposes of the poll included (1) to measure Mr. Lauzen's name identification and popularity among rank and file party members in the 14th District prior to a possible run for State Central Committeeman in that district, and (2) to assist in the planning of fundraising and other political strategy apparently in connection with his re-election to the Illinois State Senate. See Response, p. 6. The State committee did not include a copy of the telephone poll in its response.

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1 was not "testing the waters" activity, and, therefore, was not subject to 11 C.F.R.
2 § 100.131(a), which provides that only funds permissible under the Act may be used to
3 pay for such activity. The State committee asserts that "simply conducting a poll" does
4 not compel the conclusion that Mr. Lauzen was "testing the waters" for federal office,
5 and that the determination of whether an individual is "testing the waters" should be
6 guided by the facts, which it claims show that Mr. Lauzen was not "testing the waters"
7 for a federal election.

8 In support, the State committee asserts that before the poll at issue was conducted,
9 Mr. Lauzen had publicly declared his intention to seek re-election to the State Senate, and
10 had taken steps to get on the ballot for the 2006 primary and general election for that
11 purpose; therefore, because he was a candidate for State office in 2006, the State
12 committee asserts that Mr. Lauzen was "obviously not a candidate" for Representative
13 Hastert's seat in that election cycle. The State committee also asserts that the
14 Commission's regulations and precedent "generally hold that activity must be in close
15 proximity to an election for the activity to be deemed for the purpose of 'testing the
16 waters' or campaigning for federal office." Finally, the State committee argues that even
17 if Mr. Lauzen had engaged in testing the waters, it had received amounts of "hard
18 money" that were more than sufficient to cover the \$12,750 cost of the poll.

19 The complaint also alleges that on January 17, 2006, the complainant received an
20 electronic email message generated from a website maintained by the State committee.
21 The email message stated that it was from "Lauzen for Congress." See Complaint,
22 Exhibit C. The email contains a commentary entitled "Capital Spending Done Properly
23 and State of the State Speech Preview" written by State Senator Lauzen. *Id.* In the

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1 commentary, Mr. Lauzen shares his views regarding a capital spending program that he
2 expected Illinois Governor Rod Blagojevich to address in an upcoming State of the State
3 speech to the Illinois General Assembly. *Id.* Citing this email message, the complaint
4 questions whether "Lauzen for Congress" should have registered and reported as a
5 political committee pursuant to 2 U.S.C. §§ 433 and 434.

6 The State committee acknowledges that the email was sent, but asserts that the
7 inclusion of the display name "Lauzen for Congress" was inadvertent. The State
8 committee explains that the mass email cited in the complaint was generated by
9 Integrated Web Strategy ("IWS"), a firm it engaged to provide web hosting and other
10 electronic communications services. Attached to the response is a letter signed by Max
11 Fose, the owner IWS, stating that the inclusion in the email of the display name "Lauzen
12 for Congress" was "a clerical error on behalf of IWS" and that "at no time has [the] Chris
13 Lauzen for State Senate Campaign Committee stated that Senator Lauzen is running for
14 Congress." Further, the State committee points out that the email at issue was sent at
15 1:58 p.m. on January 17, 2006, and that it sent out a second email, 90 minutes after the
16 original email, that contained an explanation that the display name in the first
17 transmission contained an error, and a statement that Mr. Lauzen was a candidate for re-
18 election to the State Senate. Finally, the State committee asserts that on the day the email
19 was sent, Mr. Lauzen was an announced candidate for re-election to the Illinois State
20 Senate, and that the email was sent in connection with Mr. Lauzen's state campaign
21 activity. For all of these reasons, the State committee argues that "Lauzen for Congress"
22 was not required to register and report as a political committee under the Act.

B. LEGAL ANALYSIS

**1. Alleged Use of Prohibited Funds for
Testing the Waters Activity**

At issue is whether the telephone poll constituted “testing the waters” activity and, therefore, could only be paid for with funds subject to the limitations and prohibitions of the Act. Under 2 U.S.C. § 431(2)(A), an individual is deemed to be a “candidate” for purposes of the Act if he or she receives contributions or makes expenditures in excess of \$5,000. *Explanation and Justification for Regulations on Payments Received for Testing the Waters Activities*, Fed. Reg. 50 F.R. 9992 (March 13, 1985). The Act thus establishes automatic dollar thresholds for attaining candidate status, which trigger its registration and reporting requirements. *Id.* Through its regulations, the Commission has established limited exceptions to these automatic thresholds, which permit an individual to test the feasibility of a campaign for Federal office without becoming a candidate under the Act. *Id.* Commonly referred to as the “testing the waters” exceptions, 11 C.F.R. §§ 100.72 and 100.131 exclude funds received and payments made to determine whether an individual should become a candidate from the definitions of “contribution” and “expenditure.” Under the regulations, “testing the waters” activities include, but are not limited to, payments for polling, telephone calls, and travel. The regulations further state that only funds permissible under the Act may be used for such activities. *See* 11 C.F.R. §§ 100.72(a) and 100.131(a).

The State committee’s claim that the poll at issue was not “testing the waters” activity is unpersuasive. By its own admission, the poll at issue was conducted, at least in part, “to gauge voter preferences in a hypothetical congressional election,” and asked voters their candidate preference if Dennis Hastert retired from Congress and the 14th

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1 Congressional District were an “open seat” for the 2008 election cycle. Thus, the facts of
2 this matter place the poll within the “testing the waters” provisions. Contrary to the State
3 committee’s argument, the fact that Mr. Lauzen may have also been seeking a run for re-
4 election as a State senator in 2006 does not preclude that he was also exploring a possible
5 run for Congress in 2008.

6 The State committee appears to cite MUR 4759 for the proposition that activity
7 must be in close proximity to an election for the activity to be deemed for the purpose of
8 “testing the waters.” However, MUR 4759 does not support this proposition. At issue in
9 MUR 4759 was the date on which an individual had crossed the line from testing the
10 waters and had become a candidate within the meaning of 2 U.S.C. § 431(2), thus
11 triggering the requirement that, within 15 days from that time, the individual designate a
12 principal campaign committee (“PCC”), and the requirement that, within 10 days
13 following the 15-day period, the PCC file a Statement of Organization. The
14 Commission’s decision in MUR 4759 did not address whether activity must be in close
15 proximity to an election to be deemed for the purpose of “testing the waters.” See
16 Statement of Reasons in MUR 4759 (Friends of Phil Maloof) of Commissioners Thomas,
17 Wold, Elliott, Mason, McDonald and Sandstrom dated May 10, 1999.

18 Contrary to the State committee’s argument, activity does not have to be close in
19 proximity to an election for it to be deemed for the purpose of “testing the waters.” The
20 testing the waters provisions, 11 C.F.R. §§ 100.72 and 100.131, do not contain a timing
21 prerequisite, and often potential candidates will engage in testing the waters activity well
22 in advance of an election. For example, in Advisory Opinion 1981-32, the requester
23 proposed to undertake a variety of activities to determine whether to run for federal office

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1 in an election that would not take place for over two years. The requestor asked whether
2 planned activities related to his efforts to decide in 1981 whether he should become a
3 presidential candidate for the 1984 election would be considered by the Commission as
4 exempt "testing the waters" activities under the regulations. The Commission concluded
5 they would, as long as the requestor continued to deliberate his decision to become a
6 presidential candidate in 1984, as distinguished from conduct signifying that a private
7 decision to become a candidate had been made. Similarly, here, although the poll at issue
8 was conducted to determine the feasibility of a potential run for Congress in an election
9 that was over two years away, the activity would still fall within the "testing the waters"
10 regulations.

11 Although not raised by the State committee, we note that the fact that Mr. Lauzen
12 has not yet become a candidate, and may never become a candidate, does not preclude
13 the applicability of the "testing the waters" regulations. The regulations specifically
14 apply to situations in which an individual is considering whether he or she should become
15 a candidate, but has not decided, and may never decide, to do so. *See* 11 C.F.R.
16 §§ 100.72(a) and 100.131(a). In MUR 2133, the Republican National Committee had
17 made an in-kind testing the waters disbursement for a poll for then Vice President George
18 H. W. Bush in an amount in excess of the limit of 2 U.S.C. § 441a(2)(A). The Vice
19 President had not, at that time, become a candidate for President of the United States.
20 The Commission concluded that the poll would be a contribution if the Vice President
21 were a candidate and, even without such candidacy, was still subject to the limit of

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2 U.S.C. § 441a(a)(2)(A) pursuant to 11 C.F.R. § 100.8(b)(1).⁵ Therefore, the Commission found reason to believe the Republican National Committee violated 11 C.F.R. § 100.8(b)(1) by making an excessive in-kind disbursement to Vice President Bush in the form of poll results, and that Vice President Bush violated 11 C.F.R. § 100.7(b)(1) by accepting the excessive in-kind contribution.⁶ *See also* Advisory Opinion 1998-18 (Washington State Democratic Committee) (the costs of a telephone poll conducted for the purpose of “testing the waters” for a potential federal candidate, who never became a candidate, must nevertheless be paid for with funds from the State party’s federal account).

Thus, the poll at issue was subject to Section 100.131(a), which prohibits the use of funds in excess of the contribution limits or from prohibited sources under the Act for “testing the waters” activities. The State committee does not dispute that funds from Mr. Lauzen’s State campaign account were used to conduct the poll, and acknowledges that it had received campaign contributions from corporations.⁷ However, the State committee argues that it had received amounts raised within the limits and source restrictions of the Act that were “more than sufficient” to cover the \$12,750 cost of the poll it paid for on December 7, 2005.

⁵ The “testing the waters” provisions located at 11 C.F.R. §§ 100.7(b)(1) and 100.8(b)(1) were redesignated 11 C.F.R. §§ 100.72(a) and 100.131(a) in a restructuring of the Commission’s regulations that followed the enactment of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155.

⁶ After Vice President Bush became a candidate for President, the Commission pursued the Vice President’s authorized campaign committee, which was the Vice President’s “successor in interest” in the proceedings. Thus, the Commission found probable cause to believe George Bush for President, Inc. violated 11 C.F.R. § 100.7(b)(1), the Commission then found no probable cause to believe the Vice President violated 11 C.F.R. § 100.7(b)(1) and decided to take no further action with respect to the violation of 11 C.F.R. § 100.8(b)(1) by the RNC.

⁷ Illinois law allows state campaign committees to receive unlimited campaign contributions from individuals, as well as corporations and labor unions.

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1 We agree that the State committee had sufficient permissible funds to cover the
2 \$12,750 it paid for the poll.⁸ However, Section 110.3(d) of the Commission's regulations
3 prohibits all transfers from the nonfederal to a federal campaign of the same individual
4 regardless of whether the funds used are permissible under the Act. While Section
5 110.3(d) does not explicitly include within this prohibition transfers made during the
6 testing the waters phase of a federal campaign, Sections 100.72(a) and 100.131(a) make
7 clear that only permissible funds may be used for testing the waters activities. *See* 11
8 C.F.R. §§ 100.72(a) and 100.131(a). Thus, since candidates may not use money from
9 their nonfederal campaigns to fund their federal campaigns, individuals testing the waters
10 may not use money from their nonfederal campaigns to fund federal testing the waters
11 activity. Therefore, the State committee appears to have violated 11 C.F.R. § 100.131(a)
12 by making an in-kind disbursement, in the form of a poll for testing the waters purposes,
13 and Chris Lauzen appears to have violated 11 C.F.R. § 100.72(a) by accepting the in-kind
14 disbursement.

15 The amount of the potential violation is equal to the Federal share of the \$12,750
16 the State committee paid for the poll. The State committee has identified the following
17 purposes for the poll: (1) to gauge voter preferences in a hypothetical congressional
18 election; (2) to measure Mr. Lauzen's name identification and popularity among rank and

⁸ In its 2005 Semi-Annual Report filed with the Illinois State Board of Elections, which covers the period July 1, 2005 through December 31, 2005, the committee reported \$29,375.32 in cash on hand at the beginning of the reporting period. During the reporting period, the committee received \$46,885 in permissible itemized contributions from individuals and \$14,931 in permissible non-itemized contributions from individuals (contributions of less than an aggregate amount of \$150) for a total of \$61,816 in permissible funds. The State committee had received \$61,266 of these permissible funds prior to making the \$12,750 disbursement for the poll on December 7, 2005, and had expended only \$56,730.39 by that time. Based on a "First In, First Out" accounting method, the \$29,375.32 available at the beginning of the reporting period, plus \$27,355.07 of the permissible funds received, would have been used for the \$56,730.39 in disbursements the State committee made prior to December 7, 2005. That would leave \$33,910.93 in permissible funds available on December 7, 2005 – more than enough to cover the State committee's \$12,750 disbursement for the poll.

1 file party members in the 14th District prior to a possible run for State Central
2 Committeeman in that district; and (3) to assist in the planning of fundraising and other
3 political strategy apparently in connection with his re-election to the Illinois State Senate.
4 *See* Response, p. 6. We have no information indicating otherwise and, accordingly,
5 conclude that one portion of the cost of the poll is attributable to testing the waters for a
6 potential run for federal office, a second portion is attributable to testing the waters for a
7 potential run for State Central Committeeman, and a third portion is attributable to Mr.
8 Lauzen's race for Illinois State Senator. A possible method of attribution would be to
9 divide the cost of the poll, \$12,750, equally between the three purposes for the poll. *See*
10 11 C.F.R. §§ 106.4(e)(2), (4) (the amount of a contribution attributable to multiple
11 recipients of poll results shall be computed by dividing the overall cost of the poll
12 equally, or by any other method which reasonably reflects the benefit derived). Thus,
13 using this method, the amount of the in-kind disbursement that the State committee made
14 on behalf of Mr. Lauzen's federal testing the waters effort is \$4,250.

15 Nevertheless, considering together the relatively small amount of this potential
16 violation, and the facts that Mr. Lauzen has not and may never become a candidate for
17 federal office, and available information suggests that he has done nothing else to test the
18 waters or further a potential candidacy for federal office, we recommend that the
19 Commission dismiss this allegation in an exercise of prosecutorial discretion and
20 admonish the Respondents.

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2. **Alleged Political Committee Status**

Alleging the receipt of an email from “Lauzen for Congress,” the complaint asks the Commission to investigate whether “Lauzen for Congress” should have registered and reported as a political committee pursuant to 2 U.S.C. §§ 433 and 434. Section 433 of the Act requires each authorized campaign committee of a candidate to file a statement of organization no later than 10 days after its designation, and requires all other political committees to file a statement of organization within 10 days after becoming a political committee within the meaning of 2 U.S.C. § 431(4) (political committee is a group of persons which receives contributions or makes expenditures aggregating in excess of \$1,000 during a calendar year). Section 434 requires a political committee to file periodic financial disclosure reports with the Commission.

We conclude that the facts in this matter do not provide a sufficient basis for investigating whether “Lauzen for Congress” should have been registered with and filed disclosure reports to the Commission as a political committee. There is no information that suggests that Mr. Lauzen had crossed the line from testing the waters and had become a federal candidate pursuant to 2 U.S.C. § 431(2), or that “Lauzen for Congress” received any contributions or made any expenditures that could trigger political committee status pursuant to 2 U.S.C. § 431(4). Moreover, the email at issue related exclusively to State matters, and the State committee asserts that any reference to Mr. Lauzen’s alleged congressional committee was an inadvertent error made by a vendor, and was corrected with a subsequent email within 90 minutes. Based on the foregoing, we recommend that the Commission find no reason to believe Chris Lauzen violated 2 U.S.C. § 433 by failing to register “Lauzen for Congress” as a political committee, or

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2 U.S.C. § 434 by failing to file disclosure reports with the Commission concerning
"Lauzen for Congress."

III. RECOMMENDATIONS

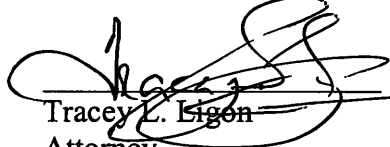
1. Dismiss, as a matter of prosecutorial discretion, the allegation that Friends for Lauzen and Lee Holmes, in his official capacity as Treasurer, violated 11 C.F.R. § 100.131(a), and admonish these Respondents.
2. Dismiss, as a matter of prosecutorial discretion, the allegation that Chris Lauzen violated 11 C.F.R. § 100.72(a), and admonish this Respondent.
3. Find no reason to believe Chris Lauzen violated 2 U.S.C. §§ 433 and 434.
4. Approve the attached Factual and Legal Analysis.
5. Approve the appropriate letters.
6. Close the file.

Lawrence H. Norton
General Counsel

Lawrence L. Calvert Jr.
Deputy Associate General Counsel
for Enforcement

1/31/07
Date

By: 
Ann Marie Terzaken
Assistant General Counsel


Tracey L. Eigon
Attorney

Attachment:
1. Factual and Legal Analysis

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